

BEFORE THE  
UTAH AIR QUALITY BOARD

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In the Matter of:

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Sevier Power Company Power Plant  
Sevier County, Utah  
DAQE-AN2529001-04

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Findings of Fact, Conclusions of Law,  
and Order

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Save Our Air and Resources (“SOAR”), James O. Kennon, and Dick Cumiskey, filed a Request for Agency Action and petition to intervene in appealing a letter of the Executive Secretary, dated June 6, 2007, concerning the Approval Order dated October 12, 2004, authorizing the construction and operation of the Sevier Power Company (“SPC”) 270 MW Coal-Fired Power Plant in Sigurd, Utah. SOAR was granted intervention by the Board. Inasmuch as the issue presented by SOAR was the same as one of the issues presented by Sierra Club in a related proceeding, the Board combined the two hearings and heard the specific issue presented by SOAR, in part on October 1, 2007, and again, in part on November 12, 2007.

At those hearings James Kennon and Dick Cumiskey appeared for themselves and SOAR, Brian W. Burnett and Fred W. Finlinson appeared for SPC, and Paul M. McConkie and Christian C. Stephens appeared for the Executive Secretary. At those hearings, Utah Air Quality Board members present were Wayne M. Samuelson, H. Craig Petersen, James R. Horrocks, Nan Bunker, Kathy Van Dame (who recused herself), Joel E. Epstein, Richard W. Sprott (who recused himself) and Darrell Smith. Board member Stead Burwell was also in attendance for the November 12 hearing but not for the October 1, 2007, hearing. He did, however, review the transcript and evidence from the October 1, 2007 hearing. Mr. Ernest Wessman and Mr. Stephen

C. Sands had previously recused themselves and were not present.

In all the proceedings and hearings, Fred Nelson acted as counsel for the Board.

The issue presented by SOAR, James Kennon, and Dick Cumiskey is whether the approval order for the SPC facility is now invalid because construction did not commence within 18 months of the approval order, having therefore automatically expired, and that the Executive Secretary's purported approval of the extension as reflected in the June 6, 2007 letter, was illegal.

On October 1, 2007, the Board ruled on the first part of the issue presented by SOAR (whether the approval order is invalid because construction did not commence within 18 months, having therefore automatically expired), by a vote of six in favor (Horrocks, Peterson, Samuelson, Smith, Bunker, and Epstein) and none opposed, determining the approval order had not automatically expired based upon the following:

Findings of Fact

1. The Executive Secretary signed the Sevier Power Company Approval Order ("AO") on October 12, 2004 and 18 months from that date is April 12, 2006. SPC 2531.

2. On October 12, 2004 and on April 12, 2006, the applicable rule was UAC R307-401-11 (now renumbered as UAC R307-401-18) which provides:

Approval orders issued by the executive secretary in accordance with the provisions of R307-401 shall be reviewed eighteen months after the date of issuance to determine the status of construction, installation, modification, relocation or establishment. If a continuous program of construction, installation, modification, relocation or establishment is not proceeding, the executive secretary may revoke the approval order.

3. Condition 9 of the Sevier Power Company AO states:

[i]f construction and/or installation has not been completed within eighteen months from the date of this AO, the Executive Secretary shall be notified in writing on the status of the construction and/or installation. At that time, the Executive Secretary shall require documentation of the continuous construction and/or installation of the operation and may revoke the AO in accordance with R307-401-11.

SPC 2535.

4. On November 17, 2005, SPC requested in a letter to the Executive Secretary that the running of the 18 month period for construction of the power plant be held “in abeyance” pending resolution of the litigation. Jenks Pre-Filed Testimony, September 10, 2007, at 13. Sprott Pre-Filed Testimony, September 10, 2007 at 11-12.

5. The Executive Secretary conducted a review of the status of the SPC approval order prior to April 12, 2006. Jenks Hearing Testimony, October 1, 2007 at 84-86. Jenks Pre-Filed Testimony, October 22, 2007, at 10. Sprott Pre-Filed Testimony, September 10, 2007 at 11-12.

6. On June 6, 2007, the Executive Secretary, at the request of the Board, sent a letter to SPC in response to the November 17, 2005, letter explaining the Executive Secretary’s position on the request and that the approval order had not been revoked. June 6, 2007 Letter from Richard Sprott to Fred Finlinson: Jenks Pre-Filed Testimony, September 10, 2007, at 13; Jenks Pre-Filed Testimony, October 22, 2007, at 11.

7. Sierra Club argued that a federal rule, 40 CFR 52.21(r), stated that “[a]pproval to construct shall become invalid if construction is not commenced within 18 months of receipt of such approval. . .”, and therefore SPC’s approval order is invalid.

8. 40 C.F.R. § 52.21(r) was not incorporated into and effective as part of UAC R307-405-19(1) by the Air Quality Board, until June 2006.

### Conclusions of Law

1. The operative provisions, UAC R307-401-11 and SPC AO Condition 9, grant the Executive Secretary discretion to decide whether, based upon his review, to revoke an approval order if construction has not commenced after 18 months. The Executive Secretary reasonably exercised discretion in not revoking the approval order.

2. 40 CFR 52.21(r) was not applicable to the SPC permit on April 12, 2006, therefore, the approval order did not automatically expire.

3. The Executive Secretary properly interpreted and complied with the requirements of UAC R307-401-11 and SPC complied with the conditions of the approval order.

On November 12, 2007, the Board upheld the actions of the Executive Secretary on the remaining part of Issue 10 (the legality of the 18 month review of the approval order) by a vote of six in favor (Horrocks, Peterson, Samuelson, Smith, Bunker, and Epstein) and one opposed (Burwell). The Boards findings and conclusions on the legality of the 18 month review were based on the following:

### Findings of Fact

1. The findings of fact for the first part of Issue 10 are incorporated herein.
2. Sierra Club argued that the Executive Secretary should have conducted a BACT review and established a new construction date at the time of the 18-month review.
3. After receipt of the November 17, 2005 letter from SPC, the matter was reviewed by DAQ staff and there was consultation between staff and management (including the Executive

Secretary) with respect thereto. Jenks Hearing Testimony, October 1, 2007, at 86-89. Jenks Pre-Filed Testimony, September 10, 2007, at 13. Jenks Pre-Filed Testimony, October 22, 2007, at 10. Sprott Pre-Filed Testimony, September 10, 2007, at 11-12.

4. The Executive Secretary directed that his permitting engineer conduct an informal review of air quality permits that had been issued subsequent to the Sevier Power Company Approval Order, to compare the emissions limitations between those permits and the SPC AO. Jenks Pre-Filed Testimony, October 22, 2007, at 11. Jenks Hearing Testimony, October 1, 2007, 88-92.

5. After the review, the Executive Secretary found nothing to indicate that the BACT determinations for the SPC facility were outdated or otherwise inadequate and opted not to revoke the SPC Approval Order. Jenks Pre-Filed Testimony, September 10, 2007, at 13. Jenks Hearing Testimony, pp. 89-92. Sprott Pre-Filed Testimony September 22, 2007, at 11-12.

#### Conclusions of Law

1. The Executive Secretary complied with the requirements of UAC R307-401-11 by conducting an 18 month review to determine the status of the SPC facility.

2. UAC R307-401-11 does not require a BACT review at the time of the 18-month review nor does it require a modification of the permit.

3. The Executive Secretary's actions in regard to the 18 month review were in compliance with the requirements of UAC R307-401-11.

#### Order

Based on the above, the Board finds that the Executive Secretary did comply with State statutes and rules of this Board. The SOAR Request for Agency Action is denied.

DATED this \_\_\_\_\_ day of January, 2008.

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Utah Air Quality Board

Notice of the Right to Apply for Reconsideration or Review

Within 20 days after the date this final order is signed in this matter by the Utah Air Quality Board, any party shall have the right to apply for reconsideration with the Board, pursuant to Utah Code Ann. § 63-46b-13. The request for reconsideration should state the specific grounds upon which relief is requested and should be submitted in writing to the Board at 168 North 1950 West, Salt Lake City, Utah, 84114. A copy of the request must be mailed to each party by the person making the request. The filing of a request for reconsideration is not a prerequisite for seeking judicial review of this Order.

Notice of the Right to Petition for Judicial Review

Judicial review of this Order may be sought in the Utah Court of Appeals under Utah Code Ann. § 63-46b-16 and the Utah Rules of Appellate Procedure by the filing of a proper petition within thirty days after the date of this Order.

## CERTIFICATE OF SERVICE

I hereby certify that on this \_\_\_\_ day of January, 2008, I caused a copy of the forgoing Findings of Fact, Conclusions of Law, and Order to be mailed by United States Mail, postage prepaid, to the following:

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